In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1638

JAMES P. CRAVEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner raises several constitutional challenges to the validity of 18 U.S.C. 922(h)(1) (receipt of firearms in interstate commerce) and alleges denial of the Sixth Amendment right to counsel.

Following a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted of all charges under a six-count indictment charging him with violations of the federal firearms and narcotics laws. The first three counts charged the possession of three unregistered automatic weapons in violation of 26 U.S.C. 5861(d) and 5871. The fourth count charged petitioner with receiving a revolver, transported in interstate commerce, while under indictment for a crime punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. 922(h)(1) and 924(a). The final two counts

charged possession of heroin in violation of 26 U.S.C. (1964 ed.) 4704(a) and 21 U.S.C. (1964 ed.) 173 and 174. Petitioner was sentenced to six consecutive terms of imprisonment totalling forty years and fined $30,000. The court of appeals affirmed.

The evidence, which is summarized in the opinion of the court of appeals (Pet. App. B), shows that, pursuant to a search warrant, law enforcement officers searched petitioner's residence in Woodlawn, Ohio, on April 30, 1971. The search revealed three automatic weapons (Counts I-III), a Smith & Wesson revolver (Count IV), and various quantities of narcotics (Counts V-VI). The revolver was shown to have been lost by a police officer on April 12, 1971, in the City of Lexington, Kentucky. A roofer testified that on April 22, 1971, he had seen lying near petitioner on the bed in the house's master bedroom a weapon which looked like the revolver named in Count IV, and that he had also seen several rifles lying about (Tr. 560-562).

1. Three of petitioner's four contentions consist of challenges to the constitutional validity of 18 U.S.C. 922(h)(1)[1] upon which Count IV of the indictment was based. He argues, first, that the court below held that "when possession is shown, it is presumed that the possessor received the firearm in interstate commerce" (Pet. 4), and he contends that such a presumption

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[1] 18 U.S.C. 922(h)(1) provides as follows:

(h) It shall be unlawful for any person—

(1) who is under indictment for * * * a crime punishable by imprisonment for a term exceeding one year;

* * * * *

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

violates due process. The decision below, however, rests on no such presumption. The court of appeals' opinion explicitly recognizes that conviction under Section 922(h)(1) requires a finding of " 'the receipt of firearms * * * as part of interstate transportation' " (Pet. App. 26, quoting *Tot* v. *United States,* 319 U.S. 463, 466). The court correctly concluded that the evidence that the revolver had been lost by a police officer on April 12, 1971, in Kentucky, and was next seen in petitioner's possession on April 22, 1971, in Ohio, was sufficient to support the jury's determination that petitioner had received the weapon in interstate commerce.[2]

2. Petitioner also argues that the statute's classification prohibiting one under indictment from receiving a firearm shipped in interstate commerce is irrational and thus violative of the Fifth Amendment's due process clause. There is no merit to this contention. While legislative classifications affecting fundamental rights must be justified by compelling state interests (see *Shapiro* v. *Thompson,* 394 U.S. 618) in less sensitive areas legislative discrimination will not be set aside if a rational basis exists to sustain it (see *Schilb* v. *Kuebel,* 404 U.S. 357, 365; *Dandridge* v. *Williams,* 397 U.S. 471, 484-485). We agree with the analysis of the court below that the right to receive firearms in interstate commerce falls into the latter category and that it was thus permissible for Congress to determine that, as a class, indicted individuals pose more of a potential threat than other members of the community as recipients of firearms. See *United States*

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[2] The jury was specifically instructed that a guilty verdict could be entered only upon a finding that petitioner had received the revolver in interstate commerce (Tr. 909-910).

v. *Thoresen,* 428 F. 2d 654 (C.A. 9); *Williams* v. *United States,* 426 F. 2d 253 (C.A. 9); *United States* v. *DePugh,* 266 F. Supp. 453 (W.D. Mo.), affirmed, 393 F. 2d 367 (C.A. 8), certiorari denied, 393 U.S. 832 (all dealing with similar prohibitions against indicted individuals). While one merely indicted is of course presumed to be innocent, this has never precluded the imposition of certain limited burdens on such individuals, such as the requirement of bail. See *Schilb, supra,* 404 U.S. at 365.

3. Section 922(h)(1) requires, as an element of the crime, that the individual receiving firearms in interstate commerce be currently under indictment.[3] The jury here was specifically cautioned that proof of petitioner's earlier indictment was to be considered only for purposes of satisfying that particular element of Section 922(h)(1) (Tr. 908). Petitioner nonetheless contends that the introduction of the indictment was impermissibly prejudicial and that a bifurcated trial would have been more appropriate. While evidence of prior criminal activity is normally inadmissible, this general rule is marked with exceptions, many of which were recognized by this Court in *Spencer* v. *Texas,* 385 U.S. 554, 560-561, including the situation where, as here, the prior conduct or status constitutes an element of the current violation. See also *Michelson* v. *United States,* 335 U.S. 469, 483; *McGautha* v. *California,* 402 U.S. 183, 209-210. And *Spencer* specifically rejected the contention that a bifurcated trial is constitutionally required where, as here, the jury was specifically cautioned that the evidence of previous criminal activity was to be considered only for a limited purpose. 385 U.S. at 567-568.

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[3] Petitioner was indicted under Ohio state law on March 26, 1971, for carrying a concealed weapon.

4. Petitioner was not present during the search of his residence but later, accompanied by his attorney, he surrendered to federal authorities. He was twice warned of his *Miranda* rights, once by an agent of the Bureau of Narcotics and Dangerous Drugs and once by a Treasury Department agent. The officers then commenced administrative paperwork regarding the arrest, during the course of which petitioner initiated a conversation regarding the charges against him. The agents responded by inquiring about the weapons found during the search, which evoked several statements by petitioner admitting his ownership of them. Petitioner's attorney was in the same room during this interchange, but apparently was not within hearing range (Tr. 684-692, 706-710).

Petitioner now claims that the introduction of those statements to prove his ownership of the weapons violated his Sixth Amendment right to counsel under *Massiah* v. *United States,* 377 U.S. 201. Unlike the situation in *Massiah,* however, petitioner was neither under indictment nor surreptitiously led into a discussion with the authorities; indeed, petitioner initiated the conversation himself after having twice been told his *Miranda* rights. It is well established that one represented by counsel can waive consultation and make an admission. See *United States* v. *Garcia,* 377 F. 2d 321, 324 (C.A. 2); *United States* v. *Brown,* 459 F. 2d 319, 323, n. 3 (C.A. 5); *Dillon* v. *United States,* 391 F. 2d 433, 437 (C.A. 10); *Coughlan* v. *United States,* 391 F. 2d 371, 372 (C.A. 9); *United States* v. *Kress,* 446 F. 2d 358, 362 (C.A. 9). In any event, any error on this point would have been harmless in this case, for substantial independent evidence conclusively demonstrated peti-

tioner's ownership of the weapons.[4] See *Chapman* v. *California*, 386 U.S. 18; *Harrington* v. *California*, 395 U.S. 250.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1973.

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[4] As the court below noted, it was adduced at trial that petitioner owned and lived in the house where the weapons were discovered, and that he had been observed, eight days prior to the search, in his bedroom with the revolver and a variety of rifles (Pet. App. 16-18; Tr. 560-562).

[illegible]